

NOT FOR PUBLICATION

SEP 27 2007

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

SHAUN XIN XU, Doctor,

Plaintiff - Appellant,

v.

MCLAUGHLIN RESEARCH
INSTITUTE FOR BIOMEDICAL
SCIENCES, INC.; et al.,

Defendants - Appellees.

No. 06-35329

D.C. No. CV-03-00134-GF-CSO

MEMORANDUM *

Appeal from the United States District Court
for the District of Montana
Carolyn S. Ostby, Magistrate Judge, ** Presiding

Submitted September 24, 2007 ***

Before: CANBY, TASHIMA, and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3. Appellant's motion for publication is denied.

** The parties consented in writing to proceed before a magistrate judge.

*** The panel unanimously finds this case suitable for decision without oral argument. Therefore, appellant's request for oral argument is denied. *See* Fed. R. App. P. 34(a)(2).

Shaun Xin Xu appeals pro se from the district court's summary judgment for defendants in his employment discrimination action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment on res judicata grounds de novo. *Akootchook v. United States*, 271 F.3d 1160, 1164 (9th Cir. 2001). We affirm.

The district court properly determined that Xu's Title VII claims were barred by the doctrine of res judicata because Xu could have brought the claims in his prior Montana state court action. *See Troutt v. Colorado W. Ins. Co.*, 246 F.3d 1150, 1156 (9th Cir. 2001) (applying Montana's res judicata doctrine to determine preclusive effect of Montana state court judgment on subsequent federal action); *Fisher v. State Farm Gen. Ins. Co.*, 991 P.2d 452, 456 (Mont. 1999) (applying res judicata doctrine to claims that could have been brought, as well as claims actually brought); *see also Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (concluding that res judicata doctrine barred Title VII claims that could have been included in state court complaint).

The district court properly determined that the Montana state court provided Xu a full and fair opportunity to litigate his claims where the record shows the state court action was dismissed with prejudice because Xu repeatedly failed to comply with the discovery process. *See Marin v. Hew, Health Care Fin. Agency*,

769 F.2d 590, 593 (9th Cir. 1985) (explaining that “some final judgments have preclusive effect even if there has been no litigation of the issues.”).

Further, the district court did not abuse its discretion by denying Xu’s Rule 60(b) motion because Xu did not demonstrate he was prejudiced by defendants’ failure to raise the res judicata defense prior to summary judgment. *See Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1100 (9th Cir. 2006) (reviewing denial of Rule 60(b) motion for an abuse of discretion); *Owens*, 244 F.3d at 713 (holding that defendant was not estopped from raising untimely res judicata defense).

Xu’s remaining contentions lack merit.

AFFIRMED.